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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

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BRIAN SCACCIA,

Petitioner,

v.

THE SUPERIOR COURT OF YOLO COUNTY,

Respondent;

SUTTER HEALTH SACRAMENTO SIERRA  
REGION et al.,

Real Parties in Interest.

C084225

(Super. Ct. No. CV141820)

Brian Scaccia believes medical professionals at a Sutter Health facility conspired to kill his mother, Anne Ringkamp. After his mother died, Scaccia sued these medical professionals, Sutter Health Sacramento Sierra Region (Sutter Health), and his brother, John Scaccia (John). The parties proceeded to engage in discovery. When the discovery matters became voluminous, the trial court issued a tentative ruling that appointed a discovery referee for all discovery motions. The trial court subsequently narrowed the

scope of the appointment. Scaccia responded by filing the present writ petition in which he seeks to vacate the discovery referee appointment on grounds of indigency. This court originally denied Scaccia's petition. Scaccia then filed a petition for review in the California Supreme Court.

The California Supreme Court granted review and transferred the cause back to this court with the following instructions: "The matter is transferred to the Court of Appeal, Third Appellate District, with directions to vacate its order denying petitioner's petition for writ of mandate and issue an alternative writ to be heard before that court when the proceeding is ordered on calendar, with directions to reconsider the appropriate scope of reference under Code of Civil Procedure section 639, subdivision (d)(3) and the parties' ability to pay under Code of Civil Procedure section 639, subdivision (d)(6)(B)." (*Scaccia v. Superior Court; Sutter Health Sacramento Sierra Region et al.*, review granted June 21, 2017 and matter transferred to Court of Appeal, Third Appellate District to issue alternative writ and order on calendar, S241695.)

We now remand the matter to the trial court with directions to conduct a hearing on Scaccia's ability to pay under Code of Civil Procedure section 639, subdivision (d)(6)(B).<sup>1</sup> If Scaccia establishes an inability to pay for the discovery referee and that he has not forfeited his objection, the trial court shall either hear the discovery matters itself or consider a cost-free alternative to the appointed discovery referee. If Scaccia does not demonstrate an economic inability to pay or he has forfeited his objection, the trial court may consider reappointing the discovery referee and the scope of the reference.

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<sup>1</sup> Undesignated statutory references are to the Code of Civil Procedure.

## FACTUAL AND PROCEDURAL HISTORY

In January 2015, Scaccia filed a first amended complaint encompassing 22 causes of action that include defamation, trespass to chattels, conspiracy to extort, tortious interference with a business relationship, racketeering, and wrongful death. The complaint alleges a salacious plot involving John's cheating and stealing the bulk of Ringkamp's money while Ringkamp feared John would kill her and Scaccia for the remainder of the inheritance. Due to John feeding his mother pizza and fast food, Scaccia alleged his mother became ill and lost weight. Scaccia moved Ringkamp to California.

Scaccia's complaint further alleges that on September 26, 2013, he took Ringkamp to a Sutter Health emergency room with symptoms of a stroke and breathing difficulties. At the emergency room, Ringkamp was treated by defendant Dr. Kennedy. Scaccia disagreed with Dr. Kennedy's course of treatment. Ringkamp was released from the hospital with a diagnosis of liver failure. She indicated to Scaccia that she wanted aggressive treatment for her condition. A Sutter Health employee urged hospice care. Ringkamp reentered the hospital on November 10, 2013, with severe respiratory distress. Dr. Kennedy asked to do a biopsy of the tumor to show that it was malignant, but Scaccia refused on account of Ringkamp's weak condition. Dr. Kennedy yelled at Scaccia when Scaccia refused requests to remove Ringkamp's ventilator.

Dr. Kennedy contacted John in violation of Ringkamp's advance health care directive. Scaccia alleges that "Kennedy covertly made John [Ringkamp]'s healthcare agent and let John make [Ringkamp's] life and death decisions." Then "John and Kennedy decided to euthanize [Ringkamp] and spring John upon [Scaccia] when removing the ventilator at [Ringkamp's] bedside." Thereafter, "someone created a 'bloody occlusion' by sticking a branch down [Ringkamp's] ventilator tube or put plant matter to wound her, perhaps mortally." The ventilator was removed. When Ringkamp did not die, she "received numerous doses of morphine" to stop her breathing. While a

loud argument ensued between John and Scaccia, a Sutter Health nurse administered a fatal dose of morphine.

The parties engaged in discovery that came to involve numerous motions. In January 2016, the trial court issued a tentative discovery order placing all discovery disputes before a referee. Eventually this order would be narrowed to refer only the following items to the discovery referee: the depositions of Scaccia, named defendants, medical professionals involved in Ringkamp's care, and percipient witnesses, as well as the written discovery relating to these depositions.

## DISCUSSION

In Scaccia's petition for review to the California Supreme Court, he asserted the order appointing a discovery referee must be vacated due to his indigency. Consistent with the Supreme Court's direction on grant and transfer of the matter back to this court, we issued an alternative writ to which real parties filed a written return. Scaccia then filed a reply. Having reviewed the parties' briefs, we proceed to consider the scope of the remand.

### A.

#### ***Section 639, Subdivision (d)(6)(B)***

The California Supreme Court's order directs us to issue an alternative writ for the purpose of having the trial court reconsider the parties' ability to pay under section 639, subdivision (d)(6)(B). (*Scaccia v. Superior Court; Sutter Health Sacramento Sierra Region et al., supra*, S241695.)

Subdivision (d)(6) of section 639 provides in pertinent part:

“All appointments of referees pursuant to this section shall be by written order and shall include the following: [¶ . . . ¶]

(A) Either a finding that no party has established an economic inability to pay a pro rata share of the referee's fee or a finding that one or more parties has established an economic inability to pay a pro rata share of the referee's fees and that another party has agreed voluntarily to pay that

additional share of the referee's fee. A court shall not appoint a referee at a cost to the parties if neither of these findings is made.

“(B) In determining whether a party has established an inability to pay the referee's fees under subparagraph (A), the court shall consider only the ability of the party, not the party's counsel, to pay these fees. If a party is proceeding in forma pauperis, the party shall be deemed by the court to have an economic inability to pay the referee's fees. However, a determination of economic inability to pay the fees shall not be limited to parties that proceed in forma pauperis. For those parties who are not proceeding in forma pauperis, the court, in determining whether a party has established an inability to pay the fees, shall consider, among other things, the estimated cost of the referral and the impact of the proposed fees on the party's ability to proceed with the litigation.”

Here, Scaccia asserts he is “homeless and/or indigent” as indicated by statements made during hearings, in “opposition papers to the demurrer, and many times on the record.” However, a review of Scaccia's cited portions of the record show only a passing reference to his indigency in February 2017 – more than a year after the initial appointment order. The record does not establish that Scaccia followed the procedure required to obtain in forma pauperis status that “requires submission of a financial statement including a listing of assets, imposes a duty to report changed financial circumstances and may subject the applicant to court examination. (See Gov. Code, § 68511.3, subds. (a), (c); Cal. Rules of Court, rules 985, 982(17), Judicial Council of California's ‘Application for Waiver of Court Fees and Costs (In Forma Pauperis)’).” (*McDonald v. Superior Court* (1994) 22 Cal.App.4th 364, 368–369.)

In the absence of in forma pauperis status, section 639, subdivision (d)(6)(A), requires the trial court to determine whether any party demonstrates an economic inability to pay a pro rata share of the referee's fees. Here, the trial court found that “[n]o party has established an economic inability to pay a pro rata share of the referee's fees.” On remand, the trial court is directed to determine whether Scaccia has proceeded in forma pauperis or otherwise demonstrated an economic inability to pay the referee's fees. (See *Scaccia v. Superior Court*; *Sutter Health Sacramento Sierra Region et al.*, *supra*, S241695.)

The trial court shall also determine whether Scaccia has preserved his challenge to appointment of the referee by timely objection. Ordinarily, “ ‘[i]n order to preserve an issue for appeal, a party ordinarily must raise the objection in the trial court.’ (*In re S.C.* (2006) 138 Cal.App.4th 396, 406.) ‘The party also must cite to the record showing exactly where the objection was made.’ (*Ibid.*) As the California Supreme Court [has] reaffirmed, ‘a reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court.’ (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) ‘The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected.’ (*Ibid.*)” (*K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939, 948–949.) What a party may not do is forego a timely objection while determining whether proceedings are going well in order “to gain the proverbial ‘two bites at the apple.’ ” (*In re Seaton* (2004) 34 Cal.4th 193, 199.)

This requirement of a timely objection to an evidentiary order by a trial court applies to self-represented litigants as well as parties with legal counsel. “While a party may choose to act as his or her own attorney, ‘ “[s]uch a party is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys. [Citation.]” [Citation.] Thus, as is the case with attorneys, [self-represented] litigants must follow correct rules of procedure. [Citations.]’ (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246–1247; *Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 524 [‘Although plaintiffs appear in this court without counsel, that does not entitle them to special treatment’].)” (*ViaView, Inc. v. Retzlaff* (2016) 1 Cal.App.5th 198, 208.) Thus, parties – whether self-represented or represented by counsel – may not remain silent about possible procedural problems related to the appointment of special discovery referees and then claim for the first time on appeal that the appointments constituted reversible error.

Here, the record indicates Scaccia did not object to the initial appointment of the discovery referee because Scaccia was satisfied with the trial judge presiding over the matter. The minute order of a hearing on March 2016 indicates the defendants

agreed to front the cost of the discovery referee but does not mention any objection by Scaccia. The parties then appeared to jointly select a discovery referee, retired judge Lynn Duryee. In January 2017, the trial court issued an order appointing the discovery referee for limited purposes. As part of the appointment, the trial court made an express finding that no party established an inability to pay a pro rata share of the discovery referee's fees.

At some point, Scaccia became dissatisfied with the trial judge who assumed this case after the new trial judge made adverse law and motion rulings. We have reviewed the record but cannot locate any indication Scaccia made any objection to the appointment of the discovery referee in the trial court during the year following the initial appointment of the referee.

On remand, the trial court shall determine whether Scaccia is either proceeding in forma paupers or can demonstrate an economic inability to pay a pro rata share of the discovery referee's costs. As required by subdivision (d)(6)(B) of section 639, "in determining whether a party has established an inability to pay the fees, [the trial court] shall consider, among other things, the estimated cost of the referral and the impact of the proposed fees on the party's ability to proceed with the litigation." The trial court shall also determine whether Scaccia preserved this issue by making a timely objection to the appointment of the discovery referee.

## **B.**

### ***Section 639, Subdivision (d)(3)***

The second part of the directions given by the California Supreme Court requires the trial court to consider the appropriate scope of reference under section 639, subdivision (d)(3). (See *Scaccia v. Superior Court*; *Sutter Health Sacramento Sierra Region et al.*, *supra*, S241695.) Subdivision (d)(3) of section 639 provides that appointment of referees must be made by written order that includes specification of "[t]he subject matter or matters included in the reference." The scope of the reference

will depend on whether Scaccia establishes his economic inability to pay discovery referee costs.

If Scaccia has preserved the issue and demonstrates an economic inability to pay, the trial court “should be prepared to devote more of its own time studying the merits of a discovery dispute than it otherwise would. This approach will help assure access to the judicial process, as well as addressing a public perception that discovery disputes are sometimes referred automatically, without due evaluation of the necessity for the reference and its impact on the parties.” (*DeBlase v. Superior Court* (1996) 41 Cal.App.4th 1279, 1284 (*DeBlase*).)

The trial court may also consider no-cost alternatives to a discovery referee who charges parties for services rendered. No-cost alternatives “include a pro bono referee, a retired judge of the superior court sitting by assignment, or retention of the matter by the trial court.” (*Solorzano v. Superior Court* (1993) 18 Cal.App.4th 603, 616.) Additional alternatives may include “working out arrangements to transfer appropriate discovery disputes to another amenable judicial officer, such as a superior court commissioner, a temporary judge, or a judge of the municipal court under a trial court coordination plan. (Gov. Code, § 68112.)” (*DeBlase, supra*, 41 Cal.App.4th at p. 1286.)

If Scaccia does not demonstrate an economic inability to pay a pro rata share of the discovery referee’s costs or he has forfeited challenge for lack of timely objection, the trial court may consider reappointing the discovery referee and the scope of the reference.<sup>2</sup>

#### DISPOSITION

Let a peremptory writ of mandate issue directing the respondent court to conduct a hearing on Brian Scaccia’s ability to pay under Code of Civil Procedure section 639,

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<sup>2</sup> We deny Scaccia’s requests for judicial notice as not relevant to the disposition of this writ proceeding.



subdivision (d)(6)(B). If Brian Scaccia establishes an inability to pay for the discovery referee and that he has not waived his objection, the trial court shall vacate the order appointing a discovery referee and shall either hear the discovery motions itself or consider cost-free alternatives to a discovery referee. If Scaccia does not demonstrate an economic inability to pay a pro rata share of the discovery referee's costs or he has forfeited challenge for lack of timely objection, the trial court may continue the discovery referee's appointment upon consideration of the proper scope of the appointment. Brian Scaccia shall recover his costs. (Cal. Rules of Court, rule 8.493(a)(1).)

\_\_\_\_\_/s/  
HOCH, J.

We concur:

\_\_\_\_\_/s/  
ROBIE, Acting P. J.

\_\_\_\_\_/s/  
RENNER, J.